ORIGINAL (5) ORIGINAL

No.03-6821

Supreme Court, U.S.
FILED
OCT 20 2003
OFFICE OF THE CLERK

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

DAVID LARRY NELSON,
Petitioner,

vs.

DONAL CAMPBELL
and
GRANTT CULLIVER,
Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO MOTION FOR STAY OF EXECUTION AND PETITION FOR WRIT OF CERTIORARI

MICHAEL KENNEDY McINTYRE*
H. VICTORIA SMITH
507 The Grant Building
44 Broad Street, N.W.
Atlanta, GA 30303
(404) 688-0900

Counsel for Petitioner
David Larry Nelson

* Counsel of Record

RECEIVED
OCT 27 2003
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
CITATIONS TO THE RECORD	iv
ARGUMENT AND AUTHORITY	1
I. INTRODUCTION	1
II. THE MEDICAL PROCEDURE THAT THE RESPONDENTS PLAN TO PERFORM ON THE PETITIONER IS NOT WITHIN ALABAMA'S EXECUTION PROCEDURE AND CLEARLY VIOLATES THE PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION	5
III. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AND ADDRESS THE IMPORTANT QUESTION OF FEDERAL LAW CONCERNING THE VIABILITY OF A §1983 ACTION BROUGHT BY A DEATH ROW INMATE WHO HAS COMPLETED HIS FEDERAL HABEAS CORPUS PROCEEDINGS AND IS NOT CHALLENGING HIS CONVICTION OR SENTENCE.	9
IV CONCLUSION	14
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASE	PAGE
Abdur'Rahman v. Bell, 535 U.S. 1016 (2002)	11
Abdur'Rahman v. Bell, 123 S.Ct. 1780 (2003)	11
Castro v. United States, Docket No. 02-6683	11
Dotson v. Wilkinson, 300 F.3d 661 (6th Cir.2002)	14
Duvall v. Keating, 162 F.3d 1058 (10th Cir.1998)	14
Edwards v. Balisok, 520 U.S. 641 (1997)	9
Estelle v. Gamble, 429 U.S. 97 (1976)	8
Farmer v. Brennan, 511 U.S. 825 (1994)	8
Felker v. Turpin, 101 F.3d 95 (11th Cir.1996)	10
Gomez v. United States District Court for the Northern District of Alabama, 503 U.S. 653 (1992)	10
In re Sapp, 118 F.3d 460 (6th Cir.1997)	10
Stewart v. Martinez-Villareal, 523 U.S. 637 (1998)	11,13
Williams v. Hopkins, 130 F.3d 333 (8th Cir.1997)	13
Wilson v. United States District Court for the Northern District of California, 161 F.3d 1185 (9th Cir.1998)	13,14
Young v. Hayes, 218 F.3d 850 (8th Cir.2000)	12,13
STATUTES	
42 U.S.C. §1983	passim
28 U.S.C. §2244(b)	10
RULES	
Rule 33 of the Federal Rules of Criminal Procedure	11,12
Rule 60(b) of the Federal Rules of Civil Procedure	11,12

CITATIONS TO THE RECORD

Citations to the record will be as follows:

Transcript of In-chambers Telephone Conference conducted by the United States District Court for the Middle District of Alabama on October 7, 2003 (T:appropriate page number);

Record in the District Court (D appropriate docket sheet number:appropriate page number);

Attachments to the Petitioner's Petition for Writ of Certiorari (A appropriate attachment number: appropriate page number); and

Respondent's Brief in Opposition (RB:appropriate page number).

ARGUMENT AND AUTHORITY

I. INTRODUCTION

In their Brief in Opposition, the Respondents blame the Petitioner for waiting so long to challenge the medical procedure that the Respondents intended to perform upon the Petitioner to gain venous access in order to execute the Petitioner by lethal injection. (RB:1). The delay is properly attributable to the Respondents because the Respondents misled the Petitioner concerning the time at which the medical procedure would be performed and only informed the Petitioner of the true time that the medical procedure would be performed six days prior to the date of the Petitioner's scheduled execution.

When the Petitioner had first expressed concerns about the Respondents' ability to gain venous access, he had been assured by the Respondents that the situation was under control and that venous access would be accomplished in a relatively simple procedure which would occur twenty-four hours prior to the Petitioner's scheduled execution. (T:9,12,23). Since the Petitioner would have visitation with family and friends following that procedure, the Petitioner believed that the Respondents were acting in good faith and that their representations were true. (T:24).

On Friday, October 3, 2003 - - six days prior to the date of the Petitioner's scheduled execution - - Respondent Culliver

met with the Petitioner and for the first time informed the Petitioner that the medical procedure would occur one to two hours prior to the execution and that the Petitioner would have no visitation following the medical procedure. (T:9,24). As a result of this meeting, the Petitioner no longer believed that the Respondents were acting in good faith or that the Respondents' previous representations were true. (T:24). Rather, the Petitioner concluded that the Respondents were planning to cut and surgically explore his body in multiple locations until they were able to gain suitable venous access. (T:24).

The next business day, Monday, October 6, 2003, the Petitioner filed an action pursuant to 42 U.S.C. §1983. In that action, the Petitioner did not challenge the validity of his conviction or sentence but merely asserted that the Respondents' proposed medical procedure included a cut-down procedure that would entail the mutilation of his body and that there was an alternative procedure that the Respondents could utilize that would not entail the mutilation of his body, namely the percutaneous central line placement procedure. The Petitioner requested that the Respondents not utilize the procedure that involved mutilation of his body and instead utilize the alternative procedure that did not.

In addressing the Petitioner's §1983 action, the district

court stated that the Respondents had offered no explanation as to why they intended to use the cut-down procedure that would involve mutilation rather than the percutaneous central line placement procedure that would not. (D13:5-6). In finding that precedent from the United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit") required the Petitioner's action to be dismissed for lack of jurisdiction, the district court stated, "It would seem that there should be a process by which Nelson can seek enforcement of his Eighth Amendment rights. However, as the law now stands, that is, absent a change by either the Eleventh Circuit or the United States Supreme Court, no such relief seems to be available." (D13:13).

By a vote of two to one, a panel of the Eleventh Circuit affirmed the district court's dismissal. In dissent, Judge Wilson stated, "The 'cut down' procedure that is to be used in his execution is not within Alabama's execution procedure nor has it been reviewed to ensure that it passes muster under the Eighth Amendment. Nelson merely requests that a different, more humane procedure known as 'percutaneous central venous cannulation' be used to carry out his execution, rather than the outmoded and painful 'cut-down' procedure. Regardless of which procedure is used, Nelson will be executed by lethal injection in accordance with his sentence." (A11:9-10). According to

Judge Wilson, "An avenue for review of Eighth Amendment claims must remain available to those facing death at the hands of the state." (A11:9 fn. 8).

In its Brief in Opposition, the Respondents completely ignore the substantive underlying issue in the Petitioner's case, the substantive underlying issue being the rationale for the Respondents' insistence on using an outmoded cut-down procedure to gain venous access which will entail mutilation of the Petitioner's body instead of using the percutaneous central line placement procedure which would not entail mutilation of the Petitioner's body. Notably, the Respondents in their brief never mention the percutaneous central line placement procedure.

This Court should grant the Petitioner's Petition for Writ of Certiorari because:

(1) Under this Court's precedent, there is no doubt that the Petitioner has raised one of the most basic constitutional rights, namely, his right not to be the subject of a medical procedure that involves mutilation of his body; and

(2) This Court should resolve the split among the circuits and address the important question of federal law concerning the viability of a 42 U.S.C. §1983 action brought by a death row inmate who has completed his federal habeas corpus proceedings and is not challenging his conviction or sentence.

It is respectfully submitted that the Petitioner's case

provides this Court with the opportunity to address this important question of federal law and resolve the split among the circuits.

II. THE MEDICAL PROCEDURE THAT THE RESPONDENTS PLAN TO PERFORM ON THE PETITIONER IS NOT WITHIN ALABAMA'S EXECUTION PROCEDURE AND CLEARLY VIOLATES THE PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Based upon the litigation in the Petitioner's case as of this date, there is no doubt that the Petitioner should have a forum in federal court where the medical procedure proposed by the Respondents can be scrutinized. As Judge Wilson stated in his dissent in the Eleventh Circuit, the procedure at issue in the Petitioner's case "had never before been implemented in Alabama and prison officials had to craft a special procedure to govern Nelson's execution." (A11:7 fn. 6). Significantly, Judge Wilson also noted that "The 'cut down' procedure that is to be used in his execution is not within Alabama's execution procedure… ". (A11:9-10).

It is respectfully submitted that the Respondents' conduct in the Petitioner's case can only lead to one conclusion. That conclusion is that the Respondents are not proceeding pursuant to any written protocol and that they will mutilate the Petitioner if they are allowed to implement their proposed medical procedure.

There is no question that the procedure that the

Respondents intend to perform on the Petitioner is a medical procedure. It is also clear that the Respondents are not following a specific protocol designed by qualified medical personnel. Finally, neither of the Respondents are qualified to design the appropriate medical procedure necessary to obtain venous access prior to the Petitioner's execution by lethal injection.

In support of the Petitioner's contention that the Respondents are proceeding in an unconstitutional and incompetent manner, the Petitioner in the district court submitted an affidavit from a Board certified anesthesiologist, Dr. Mark Heath. In response to Dr. Heath's affidavit, the Respondents relied upon the advice of Dr. Marc Sonnier, an obstetrician and gynecologist, and submitted an affidavit from Dr. Sonnier. (See Alabama Board of Medical Examiners website for Dr. Sonnier's Primary Specialty listing at www.albme.org).

Tellingly, Dr. Sonnier in his affidavit approved of gaining venous access through the "external carotid vein located in the neck"; described the "external carotid vein" in detail; and claimed to have gained venous access through the "external carotid vein" "8-10 times" throughout his twenty-two year career. (D4:Attachment of Dr. Marc Sonnier at Paragraphs 1 and 3). The "external carotid vein" does not exist in human beings.

(D11:Attachment of Dr. Mark Heath at Paragraph 5).[1]

The Respondents have acknowledged that they have never had to perform a medical procedure on an inmate to gain venous access prior to the inmate's execution by lethal injection. The Respondents' actions and assertions support the conclusion that the Respondents are not following any written protocol regarding the requisite medical procedures to be performed on the Petitioner to gain venous access. Rather, the Respondents, neither of whom is a licensed physician, appear to be "making up" medical procedures without consulting a competent, qualified, and credentialed physician.

The result of this collaboration is a planned medical procedure that undoubtedly violates the Petitioner's rights under the Eighth and Fourteenth Amendments. While the Respondents attempt to minimize the likelihood that a cut-down procedure will be necessary to gain venous access to the Petitioner, there can be no disagreement that the cut-down procedure may be necessary. This procedure will involve the mutilation of the Petitioner's body. Specifically and as described by the district court, "The procedure 'involves making a series of surgical incisions through the skin, … underlying

[1] Dr. Sonnier also, despite specializing in the field of obstetrics and gynecology, failed to properly describe the location of the femoral vein as being in the groin area, instead asserting that the femoral vein was located in the thigh. (D13:3,4).

connective tissue, … layers of fat, [and] … layers of muscle, until the region surrounding a large vein is reached.' Such a procedure entails numerous risks (such as severe hemorrhage, extreme pain, cardiac arrest and asphyxia), and therefore should only be performed by a specialist." (D13:5).[2]

It is respectfully submitted that the conduct of the Respondents in the Petitioner's case and the proposed medical procedure that involves mutilation of the Petitioner's body constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. See e.g., Farmer v. Brennan, 511 U.S. 825 (1994); Estelle v. Gamble, 429 U.S. 97 (1976).

In its Brief in Opposition, the Respondents failed to address the caselaw concerning the Eighth and Fourteenth Amendments cited by the Petitioner in his Petition for Writ of Certiorari.

The purpose of actions brought pursuant to 42 U.S.C. §1983 is to provide citizens with a vehicle to vindicate their federal

[2] The Respondents in the affidavits of Warden Culliver and Dr. Marc Sonnier have outlined a three-stage procedure for gaining venous access to the Petitioner, with the cut-down procedure being listed as the third stage. It appears that none of these procedures is pursuant to any written protocol and all of the procedures as described in the affidavits arguably implicate the Petitioner's rights under the Eighth and Fourteenth Amendments. The Petitioner has focused on the cut-down procedure in this brief because it is a reasonable assumption based upon the representations made by the Respondents throughout the litigation of the Petitioner's §1983 action that the Respondents intend to utilize the cut-down procedure on the Petitioner.

constitutional rights. The Petitioner's case raises the most basic constitutional right and his action pursuant to §1983 should have been allowed to proceed.

III. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AND ADDRESS THE IMPORTANT QUESTION OF FEDERAL LAW CONCERNING THE VIABILITY OF A §1983 ACTION BROUGHT BY A DEATH ROW INMATE WHO HAS COMPLETED HIS FEDERAL HABEAS CORPUS PROCEEDINGS AND IS NOT CHALLENGING HIS CONVICTION OR SENTENCE.[3]

In its Brief in Opposition, the Respondents attempt to minimize the significance of the question of federal law in the Petitioner's case and have asserted that "there is no true split among the circuits" regarding the treatment of §1983 actions by death row inmates after the completion of their federal habeas corpus proceedings. (RB:18).

It is respectfully submitted that this Court has clearly indicated that issues such as the §1983 issue presented in the Petitioner's case raise important questions of federal law that should be addressed. Additionally, it is clear that the circuits are split with respect to the §1983 issue in the Petitioner's case and that this split should be resolved by this

[3] As an initial matter, the Respondents in their Brief in Opposition assert that the Petitioner has not exhausted his claim filed pursuant 42 U.S.C. §1983. (RB:4). However, as this Court held in Edwards v. Balisok, 520 U.S. 641,649 (1997), there is no exhaustion requirement with respect to actions filed pursuant to §1983.

Court.[4]

The Petitioner's case raises an important question of federal law. The question is, in light of the AEDPA, are all actions filed by death row inmates in federal court subsequent to the inmates' federal habeas corpus proceedings to be treated as successive habeas petitions under 28 U.S.C. §2244(b)? This question can arise in a number of different contexts. It can

[4] This Court in Gomez v. United States District Court for the Northern District of Alabama, 503 U.S. 653 (1992) addressed the propriety of a §1983 claim raised by a death row inmate challenging execution by lethal gas as being cruel and unusual punishment in violation of the Eighth Amendment. In denying the petitioner in Gomez relief, this Court emphasized (1) that the petitioner had filed four previous federal habeas corpus petitions; (2) that the petitioner could have brought his claim more than a decade ago; (3) that there was no good reason for his abusive delay; and (4) that the petitioner's abusive delay had been compounded by last-minute attempts to manipulate the judicial process.

The Respondents in their Brief in Opposition attempt to analogize the Petitioner's case to the above-described underlying facts in Gomez. (RB:21-22). It is respectfully submitted that none of the above-described underlying facts in Gomez are present in the Petitioner's case. Most notably, the State of Alabama did not have lethal injection as the method of execution at the time the Petitioner filed his federal habeas corpus petition in 1997. Moreover, as set forth in detail in Section I, supra., the Petitioner raised his claim at the earliest practical time. Furthermore, the Petitioner is not challenging the method of execution in his action but rather is challenging a separate medical procedure that the Respondents intend to perform on him prior to the legal procedure of execution by lethal injection.

It should also be noted that some courts of appeal are interpreting this Court's ruling in Gomez as a per se rule precluding any death row inmate from pursuing a §1983 action, regardless of the type of relief the inmate is seeking. See e.g., Felker v. Turpin, 101 F.3d 95 (11th Cir.1996); In re Sapp, 118 F.3d 460 (6th Cir.1997).

arise within the context of a motion for new trial filed pursuant to Rule 33 of the Federal Rules of Criminal Procedure that is recharacterized by a court as a habeas corpus petition; a motion for relief from judgment filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure that is recharacterized by a court as a habeas corpus petition; or an action filed pursuant to 42 U.S.C. §1983 that is recharacterized by a court as a habeas corpus petition.

This Court has granted certiorari and is presently considering the propriety of a court recharacterizing a Rule 33 motion as a habeas corpus petition in Castro v. United States, Docket No. 02-6683. This Court previously granted certiorari to consider the propriety of a court recharacterizing a Rule 60(b) motion as a habeas corpus petition in Abdur'Rahman v. Bell, 535 U.S. 1016 (2002). Subsequent to the grant of certiorari, this Court determined that certiorari was improvidently granted and dismissed the petition for writ of certiorari. Abdur'Rahman v. Bell, 123 S.Ct. 1780 (2003).[5]

[5] If this Court determines that the Petitioner's action cannot proceed as a §1983 action, it is respectfully submitted that the Petitioner's case should be allowed to proceed as a habeas corpus application that is not successive under the authority of Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). In that case, the death row inmate claimed that he was incompetent to be executed. This Court found that even though the incompetency claim was raised in a second habeas corpus petition, that petition was not successive because the inmate "brought his

Consistent with this Court's interest in this issue within the context of Rule 33 and Rule 60(b), this Court should address this issue within the context of 42 U.S.C. §1983. This is true not only because it represents an important question of federal law but also because there is a split among the circuits that needs to be resolved.

Contrary to the Respondents' contention in their Brief in Opposition, there is a split among the circuits concerning this important federal question. The Respondents have conveniently failed to address the cases cited by the Petitioner in the Petitioner's Petition for Writ of Certiorari which demonstrates the split among the circuits. The courts of appeal that are in conflict with the decision rendered by the Eleventh Circuit in the Petitioner's case are the Eighth Circuit, the Ninth Circuit, and the Tenth Circuit.[6]

Specifically, in Young v. Hayes, 218 F.3d 850 (8th

---

claim in a timely fashion" and the issue was only ripe when the inmate was scheduled to be executed. Id. at 645.

Similarly, in the Petitioner's case, the Petitioner brought his claim in a timely fashion. See Section I, supra. Additionally, the Petitioner's claim was only ripe when the Petitioner was scheduled to be executed. Consequently, it is respectfully submitted that, if construed as a habeas corpus petition, the Petitioner's petition is not successive under 28 U.S.C. §2244(b) and the authority of Stewart v. Martinez-Villareal.

[6] In the Petitioner's Petition for Writ of Certiorari, the Petitioner mistakenly relied upon Dotson v. Wilkinson, 300 F.3d 661 (6th Cir.2002) in asserting that there was a split between the Sixth Circuit and the Eleventh Circuit.

Cir.2000), the Eighth Circuit considered the merits of a §1983 action filed by a death row inmate who was scheduled to be executed the next day.[7]

In Wilson v. United States District Court for the Northern District of California, 161 F.3d 1185 (9th Cir.1998), the Ninth Circuit denied a motion to vacate a temporary restraining order that had been granted by the district court in order to hear the merits of a death row inmate's §1983 action regarding clemency proceedings. In so ruling, the court stated, "The court is mindful of the last minute nature of this proceeding. Nevertheless, the delay is not attributable to [the death row inmate]. This is not a case like Gomez v. United States District Court, 503 U.S. 653, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) where the inmate could have brought his claim 'more than a decade ago.'" Wilson v. United States District Court for the

---

[7] In their Brief in Opposition, the Respondents relied upon Williams v. Hopkins, 130 F.3d 333 (8th Cir.1997) for the proposition that there is no split between the Eighth Circuit and the Eleventh Circuit. (RB:17-18). First, it should be noted that the court in Williams v. Hopkins stated, "Claims challenging the conditions of confinement or the method by which a sentence is being carried out may be asserted through a §1983 cause of action" and this statement is in conflict with the precedent of the Eleventh Circuit. Id. at 335. Second, it should be noted that Young v. Hayes, 218 F.3d 850 (8th Cir.2000) was decided subsequent to Williams v. Hopkins and the Eighth Circuit in Young v. Hayes considered the §1983 action on its merits.

Northern District of California, 161 F.3d at 1187.[8]

In Duvall v. Keating, 162 F.3d 1058 (10th Cir.1998), the Tenth Circuit addressed a death row inmate's §1983 action regarding clemency proceedings on the merits.

The viability of a §1983 action brought by a death row inmate who has completed his federal habeas corpus proceedings and is not challenging his conviction or sentence is an important federal question that has caused a split among the federal courts of appeal. This Court should grant certiorari in order to address this important federal question and resolve the split among the circuits.

IV. CONCLUSION

For the reasons stated herein as well as for those reasons set forth in the Petitioner's Petition for Writ of Certiorari, it is respectfully requested that this Court grant the Petitioner's Petition for Writ of Certiorari.

[8]It should be noted that the district court in the Petitioner's case similarly found that "Nelson did not know about the State's plan to use a "cut-down" procedure until earlier this year, so he could not have raised this issue in the federal habeas action he filed in 1997." (D13:11).

Respectfully submitted,

MICHAEL KENNEDY McINTYRE
Georgia Bar No. 494075
Attorney for Petitioner

507 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
Telephone (404) 688-0900
Fax No. (404) 525-4609

H. VICTORIA SMITH
Georgia Bar No. 658605
Attorney for Petitioner

507 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
Telephone (404) 688-0900
Fax No. (404) 525-4609

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true and correct copy of this Petitioner's Reply Brief to Respondent's Brief in Opposition to Motion for Stay of Execution and Petition for Writ of Certiorari via United States Mail with proper postage affixed thereto to the following:

Mr. Michael B. Billingsley
Deputy Solicitor General
11 South Union Street
Montgomery, Alabama 36130
Fax No. (334) 242-2848

Dated: This 20th day of October, 2003.

Michael Kennedy McIntyre

LAW OFFICE OF
MICHAEL KENNEDY MCINTYRE
507 THE GRANT BUILDING
44 BROAD STREET, NORTHWEST
ATLANTA, GEORGIA 30303-2329
TEL 404.688.0900
FAX 404.525.4609
www.michaelkennedymcintyre.com

MICHAEL KENNEDY MCINTYRE
mkm@michaelkennedymcintyre.com

H. VICTORIA SMITH
LICENSED IN GA AND SC
hvs@michaelkennedymcintyre.com

October 20, 2003

Mr. Troy Cahill
Staff Attorney
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: David Larry Nelson,
Docket No. 03-6821

Dear Mr. Cahill:

Enclosed please find the original and ten copies of the Petitioner's Reply Brief in the above-referenced case.

If you have any questions about this correspondence or the enclosed pleadings, please contact me. Thank you for your assistance in this matter.

Sincerely,

Michael Kennedy McIntyre

Cc: Mr. Michael Billingsley,
Deputy Solicitor General
(With Enclosure)

RECEIVED
OCT 27 2003
OFFICE OF THE CLERK
SUPREME COURT, U.S.